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4                   UNITED STATES DISTRICT COURT  
5                   WESTERN DISTRICT OF WASHINGTON  
6                   AT SEATTLE  
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8                   BORTON & SONS, INC.,  
9  
10                  Complainant,  
11  
12                  v.  
13                  AGRI-FRESH PROCUREMENT SERVICES,  
14                  INC.,  
15                  Respondent.

No. CV 04-1178P

16                  ORDER GRANTING  
17                  COMPLAINANT'S MOTION FOR  
18                  ORDER OF JUDGMENT  
19                  GRANTING COMPLAINANT'S  
20                  MOTION FOR SUMMARY  
21                  JUDGMENT

22  
23                  This matter comes before the Court on Borton & Son's Motion for an Order of Judgment  
24                  (Dkt. No. 45). Having considered all relevant papers and pleadings, the Court GRANTS Plaintiff's  
25                  Motion.

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27                  This case is an appeal from an administrative proceeding before the Secretary of Agriculture,  
28                  under the Perishable Agricultural Commodities Act ("PACA"). 7 U.S.C. §499a, *et seq.* In the  
29                  administrative proceeding, Borton & Sons was awarded \$31,649.60 in reparation, plus interest and  
30                  sums for handling fees, costs, and expenses. (Dkt. No. 1) Agri-Fresh moved for reconsideration and  
31                  was denied. (*Id.*). Agri-Fresh then appealed the award to this Court. This Court entered summary  
32                  judgment in Borton & Sons' favor, finding that the letter of credit that Agri-Fresh submitted to this  
33                  Court, in lieu of the statutorily mandated bond, was insufficient to meet the jurisdictional  
34                  prerequisites for appeal to this Court. (Dkt. No. 41). Following the grant of summary judgment, the  
35                  Court issued a judgment in favor of Borton & Sons. While the Order reiterated the Court's grant of

1 summary judgment, it failed to mention any award of fees to either party. Borton & Sons now  
 2 applies to this Court for an Order of Judgment granting it the reparation award and fees awarded by  
 3 the Secretary of Agriculture, as well as attorney's fees for the litigation before this Court. Agri-Fresh  
 4 opposes Complainant's Motion, stating that because its letter of credit was insufficient to give this  
 5 Court jurisdiction to hear its appeal, this Court likewise now lacks jurisdiction to grant attorney's  
 6 fees.

7 Under PACA, an award of attorney's fees to a prevailing appellee is mandatory. Robinson  
 8 Farms Co., v. D'Acquisito, 962 F. 2d 680, 684 (7<sup>th</sup> Cir. 1992), 7 U.S.C. §499g. Here, however,  
 9 Agri-Fresh argues that its appeal was never perfected and, for that reason, this Court does not now  
 10 have jurisdiction to award attorney's fees because it never had jurisdiction over the case. Although  
 11 the technical logic of Agri-Fresh's argument is enticing, it ignores Congress' objectives in awarding  
 12 "reasonable attorney's fees" to prevailing parties on appeal under PACA. 7 U.S.C. §499g.

13 Congress recognized that the reparations in PACA cases are often small. To prevent the  
 14 award from being diminished on appeal to the District Court, Congress provided for attorney's fees  
 15 to the appellee who could successfully defend its administrative award. Tray-Wrap, Inc. v.  
 16 Homestead Tomato Packing, Co., 933 F. 2d 1130, 1131 (2<sup>nd</sup> Cir. 1991). The Court in Tray-Wrap  
 17 noted that without the protection of attorney's fees on appeal, the judgment creditor would be  
 18 vulnerable to the party owing the reparation, who could try to extract a favorable settlement for less  
 19 than the amount of the reparation by threatening to file a costly appeal. Id. Although the Court in  
 20 Tray-Wrap was considering whether or not the statute supported an award of attorney's fees at the  
 21 Circuit level, the logic is the same at the District Court level. Without an award of attorney's fees to  
 22 a prevailing appellee, any party against whom the Secretary of Agriculture has entered a reparation  
 23 order could use the threat of appeal as leverage to bargain for a more favorable settlement from the  
 24 judgment creditor. This is because the creditor would realize that even defending a completely  
 25 frivolous appeal would be likely to significantly diminish the reparation award.

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1           In the case at hand, this Court found that Agri-Fresh failed to secure its appeal with an  
 2 appropriate bond. Nonetheless, the filing of this ineffective appeal still caused Borton & Sons to  
 3 spend significant amounts of money defending its reparation award. To now deny Borton & Sons the  
 4 statutorily mandated attorney's fees available under 7 U.S.C. §499g because of Agri-Fresh's faulty  
 5 appeal would be unjust.

6           The District Court for the Southern District of New York reached the same result in a similar  
 7 case involving an appeal from what the District Court interpreted to be the Secretary of Agriculture's  
 8 final reparation order. G.&T. Terminal Packaging Co., Inc. v. Hawman, 870 F. 2d 77 (2<sup>nd</sup> Cir. 1989).  
 9 In Hawman, the Secretary of Agriculture entered an order of reparation in favor of Hawman on  
 10 September 11, 1987. On September 22, 1987, the Secretary amended the order. Id. at 78. The  
 11 District Court determined that the earlier order was the final order and that the appeal filed by G.T.  
 12 on October 22, 1987 was ineffective because it was untimely. Id. at 79. Although the court  
 13 dismissed the case for lack of subject matter jurisdiction, it awarded Hawman costs and attorneys'  
 14 fees for the successful defense of his appeal. Id. The Second Circuit ultimately found that the  
 15 Secretary's amended order was the final order and that the appeal was, therefore, timely. The Circuit  
 16 remanded the case back to the District Court to assess the merits of the appeal. Id. at 80-81.  
 17 Although the District Court's decision in Hawman was ultimately reversed, this case demonstrates the  
 18 appropriateness of an award of attorney's fees on appeal, even when the appeal is ultimately  
 19 dismissed for lack of subject matter jurisdiction, as in the case at hand.

20           Accordingly, the Court having examined the pleadings, files, and records herein, considered  
 21 the evidence presented and being fully advised of the premises, now FINDS, CONCLUDES, and  
 22 ORDERS:

- 23           1. Respondent failed to file a timely and appropriate bond to secure its appeal;  
 24           2. Respondent's appeal must be dismissed because Respondent failed to file an appropriate  
 25           bond and such bond is a prerequisite to an appeal;

3. That the Secretary of Agriculture's Reparation Award of \$31,649.60 is hereby affirmed and judgment in the principle sum of \$31,649.60 plus interest thereon from October 1, 1999 to October 29, 2003 at 10% for \$12,911.30 and from October 29, 2003 to date at 10% be and is hereby awarded to the Complainant;
4. That Complainant be and is hereby awarded its reasonable attorney's fees in the sum of \$14,668.30;
5. That Complainant be and is hereby awarded its statutory costs of \$300.00;
6. That interest shall accrue on the total amount of Complainant's award at the rate of 10% APR from the date of this Order until payment;
7. That Complainant's Motion for Summary Judgment is hereby granted and Respondent's appeal is DISMISSED with prejudice.

The Clerk of the Court shall direct a copy of this order be sent to all counsel of record.

Dated: May 26, 2005.

/s/ Marsha J. Pechman  
Marsha J. Pechman  
United States District Judge